

1986

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Recommended Citation

Leland G. Smith, *The Asbestos Claims Facility - An Alternative to Litigation*, 24 Duq. L. Rev. 833 (1986).
Available at: <https://dsc.duq.edu/dlr/vol24/iss3/6>

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Comments

The Asbestos Claims Facility—An Alternative to Litigation*

I. INTRODUCTION

On June 19, 1985, after more than three years of negotiations, the Agreement Concerning Asbestos-Related Claims (Agreement) was signed by thirty-four asbestos manufacturers (producers) and sixteen insurance groups (insurers).¹ The Agreement, which will eventually lead to an independent Asbestos Claims Facility (Facility), is the result of a private sector effort to develop a means of handling the thousands of asbestos-related bodily injury claims that have inundated the courts of this country over the last two decades.² To date, more than 35,000 asbestos-related bodily injury lawsuits have been filed and many more await filing.³

The weight that can be afforded to the signatures of representatives of fifty corporations on one document is impressive in and of itself. However, the important question is: why make a monumen-

* The author wishes to thank James J. Restivo, Jr. of the Pittsburgh law firm of Reed Smith Shaw & McClay whose help was invaluable in doing the research for this comment.

1. *Fifty Companies Sign up for Wellington, Making Plan Feasible*, 1 MEALEY'S LITIGATION REP.-INSURANCE, 763, 763-64 (June 24, 1985). The original signatories to the Agreement were A C & S, Inc., Aetna Life & Casualty, Co., American Universal Insurance Group, Armstrong World Industries, Bituminous Casualty Corp., Carey Canada, Inc., The Celotex Corp., CertainTeed Corp., C.E. Thurston & Sons, Inc., CIGNA Property and Casualty Cos., Continental Corp., Crum & Forster, Dana Corp., Eagle-Pitcher Industries, Inc., Employers Insurance of Wausau, Fibreboard Corp., Fireman's Fund, Inc., First State Insurance Co., Flexitallic Gasket Co., Inc., The Flintkote Co., Genstar Corp., Harbor Insurance Co., Hartford Insurance Group, H.K. Porter, Inc., Hopeman Brothers, Inc., The Keene Corp., Liberty Mutual Insurance Co., Lloyd's of London, Maremont Corp., National Gypsum Co., Nosroc Corp., Nuclear & Environmental Protection, Inc., Nuturn Corp., Owens-Corning Fiberglas, Owens-Illinois, Inc., Pittsburgh-Corning Corp., Reliance Insurance Co., Rock Wool Manufacturing Co., Royal Insurance Co., Shook & Fletcher Insulation Co., Thorpe Insulations, Turner & Newall PLC, Unijax, United States Gypsum, Zurich-American Insurance Cos., and five confidential manufacturers. *Id.*

2. *Id.*

3. Kuntz, *Everybody Out of the Pool*, FORBES, Dec. 16, 1985 at 83.

tal effort to arrive at a private solution to what has become one of the major legal and social problems of this century? The simple answer is that it became evident to those involved in asbestos litigation that the legal system was failing to handle the claims in a just, efficient and timely manner.⁴ Thus, it was felt that the only possible solution would have to be a private one.

This comment will trace the reasons behind and the creation of the Agreement. In addition, the proposed operation of the Facility, the reactions to the concept and the activities to date of the newly-formed group will also be outlined. As a basic premise, it is fair to say that the Facility is the only viable alternative to the floundering court system and this premise is explained and justified where appropriate. Given the opportunity, the Facility should have two important results: asbestos victims will be able to get fair and timely compensation and corporations will be able to get on with the business of being corporations, not litigators.⁵

II. THE ASBESTOS CRISIS

The reasons why the Facility was created are, in some senses, as numerous as the number of corporations that have signed the Agreement. It is neither possible nor educational to explore all of the individual reasons given for signing. However, it is possible and instructive to categorize the reasons into three broad groups. These are the extent and nature of the asbestos-related litigation, the burdensome costs of trying and/or settling the asbestos-related bodily injury claims and the failure or inapplicability of other alternatives to deal with these claims. Each of these broad groups is outlined below.⁶

A. *The Extent and Nature of the Litigation*

As indicated above, more than 35,000 asbestos-related bodily injury lawsuits have been filed.⁷ At least 500 more of these suits are

4. It is not intended here to present the history of asbestos-related litigation but to outline an alternative to that litigation. For an exhaustive treatment of the litigation itself see, Special Project, *An Analysis of the Legal, Social, and Political Issues Raised by Asbestos Litigation*, 36 VAND. L. REV. 573 (1983).

5. The writer makes this statement with personal knowledge of Chief Executive Officers who have spent the great majority of their time and effort and large amounts of corporate funds dealing with the asbestos litigation.

6. As will become evident, there is some overlap among these groups and this will be considered where appropriate.

7. Kuntz, *supra* note 3, at 83.

filed each month and there is no indication that this number will decrease in the near future.⁸ In fact, some estimates indicate that between 74,000 and 265,000 asbestos-related deaths are expected over the next 30 years⁹ and that more than 21 million workers have been exposed to asbestos over the last 40 years.¹⁰ These statistics look even worse when two other notions are considered. First, some suggest that fewer than 4,000 of the filed cases have been completely settled, through either the courts or independent means.¹¹ Second, estimates show that only two percent of asbestos claims have reached resolution without a lawsuit being filed as compared to more traditional tort claims of which only two percent ever have to go to court.¹²

The foregoing statistics have been called into question by some individuals who concluded that the estimates do not withstand scientific scrutiny.¹³ These same individuals also admitted, however, that the actual extent of asbestos-related disease or exposure is not certain.¹⁴ Thus, there is still the possibility that several thousand asbestos bodily injury suits could still be filed, but they simply could not be handled by the already overloaded judicial system. This alone might have caused parties liable for asbestos injuries to seek an alternative, but other considerations also come into play.

One of these other considerations was the nature of asbestos disease and the effects therefrom on any litigation concerning the problem. Basically, there are three disease processes that can be medically related to exposure to asbestos: asbestosis, lung cancer and mesothelioma.¹⁵ Further, one aspect of these asbestos-related diseases has caused considerable difficulty in the litigation of claims apart from proof of causation; namely, the latency period between exposure to asbestos and the onset of the resultant disease.¹⁶ Estimates of this latency period range from seven to forty

8. *Id.* See also Background on the Asbestos Claim Facility (1984) (unpublished information).

9. Riley, *Asbestos: New Approaches*, NAT'L L.J., May 7, 1984, at 1, 25.

10. *Asbestos Makers Offer Deal on Claims*, Pittsburgh Post-Gazette, May 19, 1984, at 1, col. A, 3, Col. A.

11. Sugawara, *Asbestos Plan Questioned by Union Official*, Washington Post, March 20, 1985, at 1, col. 1.

12. Riley, *supra* note 9, at 26. See also McCarty, *Asbestos Claims Facility to be Established*, The Pittsburgh Press, April 5, 1984, at 1, col. 1.

13. Address by Representative Erlenborn, Annual Government Briefing of the Insurance Information Institute (June 19, 1984).

14. *Id.*

15. See generally, Special Project, *supra* note 4 at 577-82.

16. *Id.* The intent here is not to downplay the fact that debate over the medical issues

years with a generally accepted average of between twenty and thirty years.¹⁷

The problems caused by the latency period in victim versus producer claims can be illustrated by means of the hypothetical case which follows. Suppose there is a World War II shipyard worker who experienced breathing difficulties in 1975 and who eventually consulted a physician.¹⁸ As a result of the consultation and examination, he is told that he has an asbestos-related disease (asbestosis). Furthermore, he is told that if he files a lawsuit, he can be compensated for his injury. Thus, he hires an attorney and proceeds with the intention of litigating his claim. To do so, he must provide certain information. For example, he will probably remember that between the years of 1942 and 1945 he worked at the Philadelphia Naval Shipyard insulating pipes in the boiler rooms of ships. He will also remember that the insulation materials he used contained asbestos. However, he may not remember, after thirty years, exactly which producers manufactured the insulation materials he used or even what the names of the products were. This oversimplified scenario illustrates two significant problems that have been prevalent in asbestos-related bodily injury litigation due to latency periods. First, once the worker has been diagnosed as having an asbestos-related disease, his cause of action has accrued and he must file his suit within the period provided by the proper statute of limitations. Second, he must decide which producers will be named in his action. Moreover, both of these problems may be aggravated by the progressive nature of asbestos-related diseases whereby the worker's condition may worsen as time passes.¹⁹

With regard to the statute of limitations problem, an injured worker must file within a relatively short period or lose his claim.²⁰ A person who is truly suffering from a demonstrable asbestos-related disease can go to court and probably receive an award

has cost a great deal of time and effort. However, this aspect of the underlying medical issues in asbestos-related litigation is better addressed in topics other than the one presented here. *Id.*

17. See, e.g., Special Project, *supra* note 4, at 579 nn.9-12. See also Backgrounder on the Asbestos Claims Facility (1984), and Riley, *supra* note 9, at 25.

18. See generally Zinkewicz, *Lloyd's Underwriters Recommend Central Facility for Asbestos Cases*, J. COM., Oct. 8, 1984, at 1A, col. 1. The author indicates that many present claims date back to the 1940's because it takes some 30 years for asbestos-related diseases to manifest themselves. The author then notes that the years 1940-45 saw many people working in shipyards where they were subject to asbestos fibres. *Id.*

19. See generally Special Project, *supra* note 4, at 577-82.

20. Tarnoff, *Lawyers Ask Insurers for Asbestos Solutions*, BUS. INS., Dec. 5, 1983, at 21. The period is generally two to four years. *Id.*

through either verdict or settlement if his case has been timely filed. On the other hand, if the person is only marginally ill he must choose between waiting to file, perhaps losing his cause of action, and filing, perhaps receiving a very small verdict or settlement or none at all. Faced with this choice, many plaintiffs have filed with little or no impairment (adding even more cases to the ever-growing court dockets).²¹ The inequitable result was that some people received money for no injury whereas others received nothing because their claims, though serious, were barred.²² Thus, the conclusion was reached by some that a percentage of these cases were either non-meritorious from a products liability standpoint or were filed with the prospect of receiving some compensation regardless of the nature, extent or presence of any malady.²³ Moreover, it was noted that by filing a suit, even those with a real and immediate need were often required to wait for years for a decision.²⁴

The second problem, that of which parties to sue when it was not known for certain which producer's product was used, also had an entangling effect on asbestos-related litigation. To ensure that their clients were able to litigate against a responsible party, plaintiffs' attorneys historically sued every producer that they could find.²⁵ The general consensus became that untangling the mess of co-defendants could take years²⁶ because the average number of defendants in a case was twenty.²⁷ This usually meant that there would be at least twenty defense attorneys at every deposition, trial, settlement conference, etc.²⁸ Consequently, even plaintiffs' attorneys expressed the concern that, because of the multiplicity of parties involved, settlements were difficult to construct when trying to deal with twenty attorneys who, in turn, had to deal with twenty defendants and their insurers before an agreement could be reached.²⁹

21. *Id.*

22. *Id.*

23. Address by Representative Erlenborn, Annual Government Briefing of the Insurance Information Institute (June 19, 1984).

24. Background on the Asbestos Claims Facility (1984).

25. Greene, *A Way Out of the Asbestos Mess*, *FORBES*, Aug. 27, 1984 at 154.

26. *Id.*

27. Background on the Asbestos Claims Facility (1984)..

28. This multiplicity of attorneys also led to increased costs. See *infra* notes 59-62 and accompanying text.

29. Lempert, *Asbestos Treaty Plows New Ground*, *LEGAL TIMES*, May 21, 1984 at 4, col. 2.

These problems led defense attorneys to an understanding that the litigation of so many asbestos claims was highly inefficient and inequitable.³⁰ A good example of this was in the Philadelphia area where, in 1984, five full-time "asbestos judges," had little if any impact upon the asbestos cases waiting to be tried.³¹ Judge Richard B. Klein of the Philadelphia County Court of Common Pleas and Judge James J. McMonagle of the Cuyahoga County Court of Common Pleas were interviewed in 1984.³² They felt that several factors were impeding the asbestos litigation. These factors included the excessive number of asbestos suits that had been filed, the differing interests of the parties involved, the defendants' inability to agree with one another or their insurers concerning liability, and the generally large number of parties involved.³³ They also said that the problem in settling cases was not a matter of the plaintiffs and the defendants being unable to agree on a settlement figure, but rather a matter of the defendants not being able to agree on their respective shares of liability.³⁴ Finally, they indicated that the litigation had been complicated by such issues as unsettled areas of law and conflicting decisions between state and federal courts.³⁵ Thus, even the judges who were handling the cases were in a quandary as to what to do with them.

The comments of Judges Klein and McMonagle point to two other areas of asbestos-related litigation that have brought further confusion and waste to the handling of the underlying claims: first, that codefendants were wasting excessive time and money in trying to place fault on each other, and second, that from the underlying cases there arose a great deal of asbestos insurance coverage litigation.

The efforts at liability-fixing as to codefendants were quite obvious. The producers and their insurers were dealing with liability allegedly caused by exposures that took place years before the litigation began.³⁶ In the adversarial situation that arose, there was a

30. *The Wellington Plan for an Asbestos Claims Facility*, 7 CLAIMS REP. 02-1591, 02-1592 (Nov. 2, 1984).

31. *Id.* at 02-1592.

32. Tarnoff, *Judges Hope that New Claims Facility Will Help Untangle Asbestos Litigation*, BUS. INS., July 9, 1984, at 3.

33. *Id.*

34. *Id.* at 6.

35. *Id.* These problems related to the asbestos insurance coverage litigation. See *infra* notes 39-50 and accompanying text and *infra* notes 97-98 and accompanying text.

36. *System to Settle Asbestos Claims Proposed by Firms*, WALL ST. J., April 4, 1984, at 1, col. 1 (New York, Cleveland, Dallas, Chicago, Washington, San Francisco). See also *supra*

great deal of looking back and trying to remove liability by placing it upon another company.³⁷ This occurred to the point that many of those involved realized that an inordinate amount of energy and money was being spent on assessing blame and responsibility by joining codefendants or otherwise trying to look less responsible.³⁸

The asbestos insurance coverage litigation which resulted from the underlying cases in large measure was the result of the latency period of asbestos-related diseases.³⁹ Because of the varying insurance coverage theories involved, a great deal of controversy existed (and still exists) as to when a particular policy covered a latent product liability claim.⁴⁰ There are basically three theories of insurance coverage triggers that were (and are) used in the asbestos-related cases to determine when an insurance policy covers the risk. The exposure theory states that the insurer is on the risk when the claimant is exposed to the producer's product.⁴¹ The manifestation theory indicates that the insurer's responsibility does not begin until the claimant has contracted and demonstrated an asbestos-related disease.⁴² The triple-trigger theory holds that the insurer is responsible for the risk at exposure through the latency period and at the time of manifestation. That is, the insurer must give comprehensive coverage.⁴³

The result of these varying theories was that the producers wanted maximum coverage for their liability whereas no insurer wanted to admit that its policy covered an asbestos claim.⁴⁴ The basic question became, "which one (policy) pays—the company that insured the manufacturer when it sold the asbestos or the

notes 15-17 and accompanying text.

37. *Id.*

38. Backgrounder on the Asbestos Claims Facility (1984). The Backgrounder report indicates that:

Intense debate over what to do about the problem of asbestos-related injuries has centered in the courts, government, and editorial columns over the last decade. During that time an inordinate amount of energy has been spent assessing blame and responsibility. Until recently, there was little hope for a solution that would solve the problem quickly and fairly.

Id.

39. See *supra* notes 5-17 and accompanying text.

40. 36 VAND. L. REV. at 709-29.

41. See *Insurance Co. of North America v. Forty-Eight Indus., Inc.*, 633 F.2d 1212 (6th Cir. 1980) (2000 suits), *clarified*, 657 F.2d 814 (6th Cir.), *reh'g denied*, 455 U.S. 1009 (1981).

42. See *Eagle-Pitcher Indus., Inc. v. Liberty Mutual Ins. Co.*, 682 F.2d 12 (1st Cir. 1982).

43. See *Keene Corp. v. Insurance Co. of North America*, 667 F.2d 1034 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982).

44. Greene, *supra* note 25, at 154.

company that insured the manufacturer when the claim came in?"⁴⁵ Since the time period was as long as forty years, there were no clear-cut answers to this question, only more litigation.⁴⁶ Compounding this problem was the fact that from approximately the mid-1970's, either insurance coverage for asbestos diseases was not available or the policies were written very protectively with high per claim deductibles.⁴⁷ As a result, by 1984 there were between thirty and forty insurance cases pending in the United States dealing with how insurance coverage applied to asbestos cases or what insurance a corporation had to respond to these cases.⁴⁸ Moreover, the United States Supreme Court has consistently refused to rule on the insurance issues, deeming them to be issues of state contract law and thus not matters for the Court's consideration.⁴⁹ As a consequence, there seemed to be no end to the insurance litigation which became another factor prompting producers and insurers to seek an alternative means of handling the asbestos problem.⁵⁰

The asbestos-related bodily injury claims, then, produced two types of inefficient and wasteful litigation—suits by victims against asbestos producers and suits by asbestos producers against their insurers.⁵¹ These suits eventually elicited some strong comments about the litigation. For example, a Lloyd's underwriter, after studying the litigation, opined that "[t]he American court system appears to be more interested in social engineering rather than justice."⁵² Specifically, he felt that as a society we should get down to the business of compensating deserving asbestos victims as opposed to carrying out an endless pattern of blame shifting.⁵³ Others observed that the attorneys who were given control of the asbestos litigation were trained to try and to win cases which probably meant that they would, over the long run, perpetuate the historical pattern.⁵⁴ Therefore, any expectation of making the litigation more

45. *Id.*

46. *Id.*

47. Picone, *Insurers, Manufacturers Agree to Set Up Facility to Provide Settlement of Asbestos Disease Claims*, INS. ADVOC., May 26, 1984 at 4, 22-23, col. 1.

48. The Pittsburgh Press, April 5, 1984 at 1, col. 1.

49. See *Keene Corp. v. Insurance Co. of North America*, 667 F.2d 1034 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982).

50. Tarnoff, *supra* note 20, at 21. The intent here is not to make light of suits which were brought within the insurance industry itself. Primary insurers, excess insurers and reinsurers also sued each other as a result of the asbestos claims. *Id.*

51. *Id.*

52. Zinkewicz, *supra* note 18, at 1A, col. 1.

53. *Id.*

54. Zinkewicz, *Agreement Reached on Central Facility for Handling Asbestos Claims*,

efficient was indeed dim.

B. *The Burdensome Costs of the Asbestos Litigation*

The potential liability of the asbestos problem has been estimated to be in the billions of dollars.⁵⁵ More specifically, the Rand Study indicated that the cost could go as high as 87 billion dollars,⁵⁶ as the largest contributor, the Manville Corporation (formerly Johns-Manville) was estimated to have liability between one to two billion dollars or even as high as fifteen to thirty billion dollars.⁵⁷ The size of these estimates alone makes it clear why corporations would want to cut costs and preserve insurance coverage so as to avoid using corporate funds to pay verdicts, settlements and legal fees. However, these figures were not the only reason why some of those involved in asbestos litigation were prompted to look for an alternative way to spend precious insurance coverage. They were prompted as well by how the money was actually being spent.⁵⁸

Some part of the cost analysis problem dealt with the litigation itself. One frequently cited example was that of an asbestos deposition at which as many as twenty defense attorneys would question the same witness.⁵⁹ It was often noted that many of these attorneys would ask the same questions or, in fact, do nothing.⁶⁰ These kinds of activities were in large measure responsible for some estimates that injured workers were getting as little as thirty-seven cents on the dollar; the remaining sixty-three cents was being spent on legal fees.⁶¹ One insurer concluded that it cost \$95,000 to pay a plaintiff \$35,000.⁶²

Moreover, three other factors indicated that money was being misplaced or otherwise misused. First, there was a great deal of inequity among the jurisdictions where cases were tried or set-

J. COM. Nov. 7, 1984, at 15A, col. 1.

55. *System to Settle Asbestos Claims Proposed by Firms*, Wall St. J., April 4, 1984, at 1, col. 1.

56. Kakalik, Ebener, Felstiner & Shanley, *Costs of Asbestos Litigation*, RAND INSTITUTE FOR CIVIL JUSTICE (July, 1983).

57. Carpenter, *Asbestos Litigation at Turning Point*, J. COM., April 5, 1984, at 1A, col. 1.

58. See generally Backgrounder on the Asbestos Claims Facility (1984).

59. Tarnoff, *supra* note 20, at 21.

60. *Id.*

61. Kakalik, *supra* note 56.

62. Tarnoff, *supra* note 20, at 21.

tled.⁶³ This led to the observation that two plaintiffs who worked at the same place, were exposed to the same products, and had essentially the same illness could get different amounts of money by filing their suits in different courts.⁶⁴ Second, there were experienced opinions that too many individuals without demonstrable disease were getting awards.⁶⁵ Finally, it was noted that none of the estimates of the liability or costs of the litigation included any of the money spent by the producers and insurers on the many lawsuits that arose over insurance coverage.⁶⁶

Therefore, two basic conclusions were reached. First, the asbestos litigation was expensive, with too little of the money going to the injured parties who deserved it. Second, additional money was being spent, not to compensate victims, but to determine who should compensate them. At base, there simply was not enough money to perpetuate such a system.

C. The Failure or Inapplicability of Other Alternatives

Once the conclusion was reached by various producers that the asbestos litigation was unmanageable, there appeared to be three alternatives to the use of the tort system—workmen's compensation, bankruptcy proceedings or a private sector solution.⁶⁷ For the reasons outlined below, it became evident that only the third alternative could function and at the same time accrue the most benefits for the involved parties.

The first possible substitute for litigation of asbestos-related bodily injury claims was workmen's compensation. Studies indicated, however, that very few asbestos claimants were entitled to disability under the existing systems.⁶⁸ This was because of the relatively high degrees of disability required by these systems.⁶⁹ Further, the courts offered a much more lucrative award to plaintiffs than the relatively small stipends offered by workmen's compensation.⁷⁰ The consensus was that, in reality, workmen's compensation

63. Backgrounder on the Asbestos Claims Facility (1984).

64. *Id.*

65. Address by Representative Erlenborn, Annual Government Briefing of the Insurance Information Institute (June 19, 1984).

66. Tarnoff, *Asbestos Coverage Pact, Claims Facility Negotiated*, BUS. INS., April 9, 1984, at 1, col. 2.

67. See generally Address by Representative Erlenborn, Annual Government Briefing of the Insurance Information Institute (June 19, 1984).

68. *Id.*

69. *Id.*

70. *Id.*

was by-passed in favor of third party product liability actions.⁷¹ It is fair to say then that workmen's compensation did not fail but simply was not used. As such, an unused alternative could not be depended upon to handle the majority of asbestos claims.

The second alternative was bankruptcy. This method had been chosen by a number of corporations as a way of dealing with the asbestos claims.⁷² The most important example of this was the Manville Corporation which was one of the most heavily involved parties in the asbestos suits.⁷³ On August 26, 1982, forced by increasingly successful and more frequent law suits, Manville applied for reorganization under Chapter 11.⁷⁴ At the time of filing, the corporation was financially solvent, but claimed that it needed protection because it estimated that asbestos-related claims would wipe out its assets of two billion dollars.⁷⁵ However, some have classified this as a "bold legal maneuver" that immediately "blocked new suits, pending claims and executions on judgments."⁷⁶ Regardless of the motives, the Manville bankruptcy achieved these effects while the corporation continued in business.⁷⁷

Thus, it seemed that bankruptcy had the supposed effect of getting some companies out from under the pressures of the asbestos litigation. It had the effect of shielding a company while its assets were being reorganized. However, there were two reasons why bankruptcy could not be a general solution to the asbestos problem. First, each corporation was not an independent factor in the litigation.⁷⁸ Whether by choice or not, the defendants were closely connected and what one did had an effect on the others.⁷⁹ Second, because no other alternative was viable (except litigation), a deluge of bankruptcies would have meant that victims would initially get very little compensation for valid claims and would have to wait, perhaps many years, for the remainder of their compensation.⁸⁰

71. *Id.*

72. *See, e.g.,* Debtor's Petition under Chapter 11, In re UNR Indus., No. 82B 90841 (Bankr. N.D. Ill. filed July 29, 1982).

73. *See generally* Riley, *supra* note 9, at 1.

74. Debtor's Petition Under Chapter 11, In Re Johns-Manville Corp., No. 82 BKey. 11656 (Bankr. S.D.N.Y. filed August 26, 1982).

75. *Id.*

76. Riley, *supra* note 9, at 25.

77. *Id.*

78. Olick, *Chapter 11-A Dubious Solution to Massive Toxic Tort Liability: A Ten-Point Proposal for an Asbestos Superfund*, 18 THE FORUM 1 (1983).

79. *Id.*

80. *Id.*

Therefore, the majority of corporations concluded that while bankruptcy might be a good individual solution or defensive strategy, it could not be an overall remedy for the legal/social problem of asbestos injury. It was, as the possible solution of workmen's compensation had been, eliminated as a workable solution to the asbestos crises, leaving only the possibility of private sector resolution of the problem.

III. THE ASBESTOS CLAIMS FACILITY

With the foregoing problems concerning the asbestos situation in mind, negotiations began in October of 1982 to achieve a private sector solution to handle the asbestos-related claims.⁸¹ These negotiations were under the auspices of New York's Center for Public Resources, whose president was James F. Henry.⁸² The goals set were to establish a Facility, solve the insurance coverage disputes and develop a system of Alternative Dispute Resolution (ADR).⁸³ During the first seventeen months of negotiations, the basics of the Facility were formed from concepts that had been previously reviewed by the Asbestos Claims Council.⁸⁴ Also, the concept of a Facility was one of the key proposals made to the group by the Los Angeles consulting firm of Hamilton, Rabinowitz & Szanten.⁸⁵ In short, the Hamilton proposal called for defendants (producers) and their insurers to "charge one or more working-level groups with preparation of a conceptual description, a financial plan, and to draft Articles of Incorporation and Bylaws for a new non-profit entity."⁸⁶

The difficult talks were moderated by Harry Wellington, Dean of the Yale Law School, from whom the popular name of "Wellington Agreement" is derived.⁸⁷ Basically, two groups of negotiators were involved, a group of insurer representatives and a group of pro-

81. Principles of Agreement (Executed by representatives of producers and insurers, Jan. 5, 1984 and Jan. 10, 1984) (Available in Duquesne University Law School Library).

82. Gilman, *Asbestos Claims Facility Looms, May Starting Date Possible*, NAT'L UNDERWRITER, April 13, 1984, at 1, 71. The Center for Public Resources is an effort by 130 corporations and 50 law firms to find alternatives to litigation. *Id.*

83. Press release (Released by producers and insurers, April 3, 1984).

84. *Non-Profit Asbestos Claims Facility Proposed to Settle Asbestos Suits*, 1 ASBESTOS LITIGATION REP., 8061, 8062 (April 6, 1984). The Asbestos Claims Council was the group of insurer representatives that considered problems in the asbestos litigation. *Id.*

85. *Id.*

86. *Id.*

87. Press release (released by producers and insurers, April 3, 1984).

ducer representatives.⁸⁸ In addition, from time to time, a number of plaintiffs' attorneys were involved in the discussions.⁸⁹ However, because many of the questions related to the creation of the Facility were producer/insurer insurance questions, it became evident that these two groups would have to meet without the plaintiffs' representatives in order to first work out their differences.⁹⁰ Thus, the bulk of the negotiations were carried out by the producers and insurers with ancillary groups to carry out related functions.⁹¹

Initially, the most important task was to clearly identify the issues.⁹² The primary result of this was probably most succinctly put by Dean Wellington who said, "No true solution to the underlying tort litigation problems was possible . . . unless insurers and producers could agree on what, in the end, comes down to the answers to a single question: who pays for what?"⁹³ Although that question may now seem simple, those who participated say that the problems were so complex and the self-interests of the participants so diverse that they nearly defied solution.⁹⁴ Briefly stated, the most difficult problems were related to the insurance coverage to be afforded, coverage triggers, duty to defend, and deductibles.⁹⁵ A brief description of these and related problems will suffice to illus-

88. *Id.* The negotiators changed over time, but at the time of closing the insurance negotiations were John F. Shea, Jr., of Aetna Life and Casualty Co., Claude Glaser, Jr., of Hartford Insurance Group, James W. McMahon of CIGNA Corp., Edward T. Harris of Continental Insurance Co., Peter Shea of Liberty Mutual Insurance Co., and C. James Ayliffe and Keith R. Rayment representing Lloyd's and The London Cos. Producer negotiators were John L. Baldwin, president of Pittsburgh Corning Corp.; James J. Restivo, Jr. of Reed Smith Shaw & McClay for Pittsburgh Corning Corp.; E. Judge Elderkin of Brobeck, Phleger & Harrison for Fibreboard Corp.; Scott D. Gilbert of Covington & Burling for Armstrong World Industries; Daniel M. Phillips for Owens-Corning Fiberglas Corp.; Phillip McWeeney for Owens-Illinois, Inc.; and Robert Emerton for Celotex Corp. *Id.*

89. Picone, *supra* note 47, at 23. Plaintiffs' attorneys included Fred Baron, Dallas, Tex.; Paul Gillenwater, Knoxville, Tenn.; Thomas W. Henderson, Pittsburgh, Penn.; Stanley J. Levy, New York City, N.Y.; Gene Locks, Philadelphia, Penn.; Ronald L. Motley, Charleston, S.C.; Robert B. Steinberg, Los Angeles, Cal.; and Robert E. Sweeney, Cleveland, Ohio. *Id.*

90. Zinkewicz, *supra* note 54, at 15A, col. 1.

91. Wellington: *A Long, Difficult Settlement Process*, 1 MEALEY'S LITIGATION REP.-ASBESTOS 1942, 1944 (March 8, 1985). "In all, 16 producers and 12 insurers participated in drawing up the Wellington draft, and the insurers footed the bill, paying for Wellington & Dauer (his deputy dean), CPR, consultants . . . , [a] public relations agency . . . , and computer studies." *Id.*

92. Lempert, *supra* note 29, at 4, col. 1.

93. McIntyre, *Asbestos Facility's Moderator Pleads His Case to Executives*, BUS. INS., Oct. 22, 1984, at 10, 12.

94. 1 MEALEY'S LITIGATION REP.-ASBESTOS, *supra* note 91, at 1944.

95. Shea, *Principal Negotiators Discuss Proposed Insurance Agreement*, 1 MEALEY'S LITIGATION REP.-ASBESTOS 560, 562, 566 (May 15, 1984).

trate the nature of the problems solved by the agreement. Basically, the problems fell into one of four categories: producer versus insurer problems, insurer positions, producer positions and plaintiff positions.⁹⁶

The producer versus insurer problems were probably the easiest to see and, perhaps, the most difficult of resolution. The litigation that had arisen between the two groups with regard to the coverage trigger theories caused a great deal of friction.⁹⁷ However, there were still other cases that arose between producers and insurers with regard to the duty to defend issue. Producers claimed that even though policy limits were exhausted, the duty to defend continued as to ongoing cases: Insurers insisted that the duty to defend ended when policy limits were gone.⁹⁸ Both of these types of litigation included claims of bad faith and for punitive damages.⁹⁹ Moreover, most negotiations between individual producers and insurers had broken down, leaving an air of anger and mistrust between the parties.¹⁰⁰

The insurer positions were caused by the basic structure of the insurance industry which made it very difficult for insurers to have a cohesive position.¹⁰¹ In general, some were primary carriers and some were excess carriers.¹⁰² The former had defense clauses in their policies whereas the latter did not; this created different interests.¹⁰³ Moreover, some insurers had per person deductibles that they wanted to retain.¹⁰⁴

A primary carrier is an insurer who writes the initial coverage on a risk.¹⁰⁵ These insurers not only have a duty to indemnify their policyholders, but also have to provide defense costs which do not deplete their liability limits.¹⁰⁶ By comparison, an excess carrier writes additional layers of coverage on a risk.¹⁰⁷ The excess policies

96. Zinkewicz, *supra* note 54, at 15A, col. 1.

97. See *supra* notes 36-50 and accompanying text.

98. See, e.g., *Commercial Union Ins. Co. v. Pittsburgh Corning Corp.*, 553 F. Supp. 425 (E.D. Pa. 1981), *modified*, 609 F. Supp. 685 (E.D. Pa. 1985), *appeal docketed*, Nos. 85-1450 and 85-1486 (3d Cir. filed Aug. 1, 1985).

99. 1 MEALEY'S LITIGATION REP., *supra* note 91, at 1942.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Wellington to Proceed with Binding Signup, Facility*, 1 MEALEY'S LITIGATION REP. 1938, 1939 (March 8, 1985).

105. Zinkewicz, *supra* note 54, at 15A.

106. *Id.*

107. *Id.*

normally do not have defense obligations and, if they do, the defense costs reduce indemnity limits.¹⁰⁸ Furthermore, there are reinsurers that take part of the risk from both primary and excess carriers but do not have any contractual relations (defense obligations) with the policyholders.¹⁰⁹ This structure created varying interests that were brought to the negotiations leading to the Agreement. Because of high defense costs, some primary insurers had an interest in exhausting their indemnity limits quickly where the defense obligation was tied to indemnity.¹¹⁰ However, excess carriers did not want this for it resulted in the obligation to pay sooner.¹¹¹ In other words, if the excess carrier had no defense obligation, it was bound to be less concerned about litigation costs than the primary carrier.¹¹² Finally, since reinsurers did not have to pay until the earlier layers of coverage were expended, they wanted the first layers of coverage to last as long as possible.¹¹³

Per claim deductibles in asbestos policies were like the familiar deductibles in home owner's and automobile policies. Some of the policies required that the policyholder first pay a set amount on a particular claim before the insurer would pay the remainder of the claim. These deductibles were another way in which some insurers reduced their monetary obligations in the asbestos litigation, thus, their position was to retain them.¹¹⁴

The producers also had positions which were difficult to reconcile. Initially, "the producers . . . had nothing in common except the asbestos litigation in both the underlying tort cases and the coverage cases" and "[t]hey had different policies and different approaches to deal with these things."¹¹⁵ Essentially, there developed three producer positions which were in conflict. First, the defendant producers in the underlying tort litigation were deeply divided between litigation, bankruptcy or the Facility. Second, the producers were divided in the method of calculating their portion of liability, as that calculation would determine the percentage to be paid in all future settlements. Third, the producers' attitudes and priorities were influenced by the amount of insurance and coverage

108. *Id.* There can be hundreds of reinsurers on a risk. *Id.*

109. 1 MEALEY'S LITIGATION REP.-ASBESTOS, *supra* note 104, at 1939.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. 1 MEALEY'S LITIGATION REP.-ASBESTOS, *supra* note 91, at 1942.

that they had. Producers whose insurance coverage was only short term would have different priorities from producers who had long term coverage.¹¹⁶

Therefore, philosophy, liability share and insurance coverage differed among producers. The most sensitive of these was the liability share issue.¹¹⁷ Many producers had been historically secretive about the amounts that they had paid for settlements and were reluctant to share this information with other producers, let alone insurers other than their own.¹¹⁸ The reason was essentially that market share value was used to determine proportionate liability. Producers, therefore, did not want to admit their actual shares if they had been paying less than their market share, because to do so might lead to a greater liability share if an agreement could not be reached.¹¹⁹

Problems also arose when the plaintiffs' attorneys became involved. These attorneys had to answer to two separate entities.¹²⁰ On the one hand they had to protect the rights of their clients, whereas on the other they had to consider the wishes of their colleagues in the plaintiffs' bar.¹²¹

Thus, there were conflicts on all fronts. To the credit of those involved, however, after seventeen months of negotiations an announcement was made that an agreement was ready for consideration.¹²² In effect, the tentative Agreement did three things. First, it settled all of the issues between the producers and insurers.¹²³ Second, it provided a means to get the thousands of asbestos-related bodily injury cases out of the courts.¹²⁴ Third, it gave formulas to allocate the liability among the producers.¹²⁵ The tentative Agreement was then sent to 200 companies for review.¹²⁶ Finally, after an additional number of months (making the total time over three

116. Zinkewicz, *supra* note 54, at 15A.

117. 1 MEALEY'S LITIGATION REP.-ASBESTOS, *supra* note 104, at 1939.

118. *Id.*

119. *Id.*

120. 1 MEALEY'S LITIGATION REP.-ASBESTOS, *supra* note 91, at 1942.

121. *Id.* Basically, in attempting to procure the most favorable settlement for their clients, plaintiffs' attorneys also had to ensure that their fellow colleagues' positions would not be hampered by the settlement. *Id.*

122. Press Release of Asbestos Companies and Major Insurers (April 3, 1984).

123. Pittsburgh Press, *supra* note 12, at 1, col. 1.

124. *Id.*

125. Tarnoff, *Asbestos Producers Mulling Agreement*, BUS. INS., May 28, 1984 at 1, col. 1, 79, col. 1.

126. *Insurance Settlement Proposal Sent to 200 Potential Subscribers*, 1 MEALEY'S LITIGATION REP.-ASBESTOS 535 (May 25, 1984).

years) of review, revision and persuasion, the Agreement Concerning Asbestos-Related Claims was executed.¹²⁷

At this writing, it is not possible to outline exactly how the Facility will function because there are certain policies that have not as yet been completely formulated within the Agreement. Therefore, to do so would be an exercise in supposition. It is possible, however, to consider seven categories that are being and will be treated under the Agreement. These are: the goals of the Facility; the benefits that will accrue to those involved with the Facility; the basic structure of the Facility; claims handling under the Agreement; cost handling under the Agreement; the handling of intraperspective and extraperspective problems by the Facility; and the addition of new members to the Facility.

A. *Goals of the Facility*

The goals of the Facility can be generally stated to include the solution of the problems that became associated with asbestos exposure and the resulting bodily injury claims that arose, at least with respect to the signatories to the Agreement.¹²⁸ More specifically, they can be stated as

[T]he encouragement and facilitation of negotiated settlements; the promotion of fair, consistent and timely resolutions of asbestos-related claims; the establishment of an efficient and cost-effective method of processing asbestos claims; the encouragement of resolution of disputes through non-judicial procedures; and the encouragement of waiver of punitive damage claims, at the earliest practicable time.¹²⁹

In order to accomplish these goals, the signatories to the Agreement are in the process of establishing the Facility as a private sector entity which, in reality, will be an independent, non-profit corporation.¹³⁰ The Facility will provide incentives to encourage settlements and disincentives to discourage the use of the tort system as a means of resolving asbestos-related bodily injury claims.¹³¹ It is planned that the goals be reached by: providing plaintiffs with a faster and more equitable means of compensation; removing the inequality in settlements by providing a central filing place for claims; reducing the legal costs of both plaintiffs and de-

127. See generally Agreement Concerning Asbestos-Related Claims (June 19, 1985).

128. See generally Section II of this comment.

129. Picone, *supra* note 47, at 22-23.

130. Backgrounder on the Asbestos Claims Facility (1984).

131. Picone, *supra* note 47, at 23.

fendants by encouraging settlements; ending the insurance coverage disputes by providing comprehensive coverage from exposure through manifestation; and allowing the producers and insurers to manage liabilities in such a way as to allow future planning.¹³² Since the signing of the Agreement, those in control of the Facility have been moving forward to meet these goals and, despite the issues and/or problems that have been raised,¹³³ progress has been made.¹³⁴

B. *The Benefits of the Facility*

Assuming that the Facility will meet its goals, there are four groups that will benefit from proper use of the Facility. These groups are claimants, insurers, producers and the courts with attendant benefits to society.

The most important benefit to be gained by an injured worker will be that the use of the Facility is on an entirely voluntary basis with the claimant having recourse to the tort system at every step.¹³⁵ While the use of the tort system will be discouraged by the Facility, this notion ensures that the claimant will have his full range of constitutional rights up to the point where he has reached an agreement concerning the value of his case. In addition, claimants will benefit because the use of the Facility will avoid the delay caused by the backlogged court dockets and will afford the claimant a single place to settle with all of the producers who are signatories to the Agreement.¹³⁶ Thus, a victim will be able to more quickly receive compensation, which is often significant to a disabled individual who is impaired to the point that he has lost his capacity to earn income. Moreover, it is hoped that the Facility will achieve more or less standard settlement values for similarly situated claimants and that it will remove the rigors and difficulties often encountered by impaired individuals who have to sit through a long trial.¹³⁷ Finally, for claimants with little or no impairment or dysfunction, the Facility will offer a deferral program whereby it will agree to waive the applicable statute of limitations until (if at all) the claimant's condition worsens. Should such a

132. Backgrounder on the Asbestos Claims Facility (1984).

133. See *infra* notes 200-65 and accompanying text.

134. See *infra* notes 266-74 and accompanying text.

135. 7 CLAIMS REP., *supra* note 30, at 02-1592.

136. 1 MEALEY'S LITIGATION REP.-ASBESTOS, *supra* note 95, at 563. See also 1 MEALEY'S LITIGATION REP.-ASBESTOS, *supra* note 126, at 536.

137. 1 MEALEY'S LITIGATION REP.-ASBESTOS, *supra* note 126, at 567.

happenstance occur, the claimant will be able to reapply for an award.¹³⁸

In summary, the individual with an asbestos-related injury can expect his claim to be resolved in a much quicker and more efficient manner. However, there is one caveat that needs to be mentioned. The submission of a claim to the Facility does not automatically mean that the individual will receive damages. A claimant will still have to demonstrate that he suffers from an asbestos-related disease with some level of dysfunction.¹³⁹ This, however, is no more or less than one could or should expect when undertaking a lawsuit and, at least to many, does not severely restrict the concept of the Facility.¹⁴⁰

Insurers who have signed the Agreement will enjoy benefits as well. There are essentially five benefits. First, the Agreement provides for the resolution of all of the existing coverage suits in which signing producers and insurers are involved.¹⁴¹ This is and will be accomplished by dismissals in the pending declaratory judgment actions.¹⁴² Second, the dismissals also remove the expense and insurance personnel time involved in these suits.¹⁴³ Third, since the dismissals are with prejudice, they also remove the threat of punitive damages from insurers.¹⁴⁴ Fourth, there will be attendant in-house savings with respect to claims handling because one attorney can do the work that was previously done by many in cases that eventually went to trial.¹⁴⁵ Finally, most non-aggregate policies will be capped under the Agreement.¹⁴⁶ Overall, these benefits will save insurers time and money and give them some sense of certainty as to how coverage dollars will be spent.

Before moving on to the benefits that will be received by produc-

138. 7 CLAIMS REP., *supra* note 30, at 02-1592. In Facility parlance this concept is known as a "Green Card."

139. Gannon, *Claims Panel May Reduce Asbestos Jam*, Pittsburgh Business Times, April 9-15, 1984, at 1, col. 1, 43, col. 1.

140. *But see* the complaints about this *infra* notes 260-65 and accompanying text.

141. 1 MEALEY'S LITIGATION REP.-ASBESTOS, *supra* note 95, at 560. *See also* 1 MEALEY'S LITIGATION REP.-ASBESTOS, *supra* note 126, at 535.

142. *Special Edition-Asbestos Claims Facility*, 1 ASBESTOS LITIGATION REP. 8356 (May 18, 1984).

143. 1 MEALEY'S LITIGATION REP.-ASBESTOS, *supra* note 95, at 560. *See also* 1 MEALEY'S LITIGATION REP.-ASBESTOS, *supra* note 126, at 535.

144. 1 MEALEY'S LITIGATION REP.-ASBESTOS, *supra* note 95, at 560.

145. *Id.* According to Mr. John Shea of Aetna Life & Casualty, because, under the terms of the Facility, the producers will have agreed to a percentage share of liability, theoretically, only one defense counsel will be needed to represent all the producers at the Facility. *Id.*

146. *Id.*

ers who have signed the Agreement, it is necessary to consider one area which will equally benefit both the insurers and the producers. In addition to providing for the dismissal of the coverage suits, the Agreement also provides for a system of Alternative Dispute Resolution (ADR) to handle any coverage dispute that may arise in the future between the subscribers to the Facility.¹⁴⁷ This will no doubt save both producers and insurers considerable time and money by avoiding excess litigation and should be considered as a plus to both sides.

The producers who have signed the Agreement will be further benefited. Most importantly, they will receive the broad coverage that they sought in the insurance litigation and a more cost-efficient way of handling the claims.¹⁴⁸ The former gives "comprehensive coverage" for an "exposure period" that begins on the first date of exposure to the asbestos-containing product(s) of a producer until manifestation of an asbestos-related disease.¹⁴⁹ The latter means that the insurance coverage will be spent more reasonably.¹⁵⁰ Also as regards insurance coverage, "producers will be able to select a date between 1973 and 1979, and all policies prior to that date will then constitute a block of coverage for payment before a producer has to apply payments to policies written in protective years."¹⁵¹ This will allow the producers to use all policies that provided "true coverage" before they have to make payments from their own resources.¹⁵² Moreover, they will be allowed to add sequential years to the block when they so desire.¹⁵³ These insurance coverage provisions will allow producers to utilize efficiently the insurance coverage that they bought and for which they paid, with the result that corporate funds will be protected from use in asbestos litigation. The latter point will also help to avoid bankruptcy and its concomitant effects on other defendants and claimants. Finally, the signatories to the Agreement will be able to have a unified defense when recourse to the tort system is necessary.¹⁵⁴ Thus, the thirty-six producers will be able to do with one law firm what had historically been accomplished through the use of per-

147. Picone, *supra* note 47, at 22.

148. 1 MEALEY'S LITIGATION REP.-ASBESTOS, *supra* note 126, at 536.

149. *Id.* at 535.

150. *Id.* at 536.

151. Picone, *supra* note 47, at 22.

152. *Id.* This will avoid the use of policies that were protectively written by insurers to avoid the large payments that resulted from the asbestos litigation. *Id.*

153. *Id.*

154. 7 CLAIMS REP., *supra* note 30 at 02-1592.

haps thirty-six law firms.¹⁵⁵ Again, the cost savings will be evident and will provide more funds from which to pay deserving claimants.

Lastly, there are benefits from the Agreement that will flow to the courts and society in general. Courts should benefit from the Facility's emphasis on settlement through negotiation and the ADR process because these notions will take many of the cases out of the already overburdened court systems.¹⁵⁶ Further, it has been suggested that, if the Facility is successful, it may well become a role model for other major areas of dispute in toxic torts such as Agent Orange, DES and waste disposal.¹⁵⁷ Once the Facility is functional, the former will undoubtedly be true. The latter is certainly a matter of supposition at this time. However, if the Facility is successful and if other areas of toxic torts reach the proportion of the asbestos litigation, it seems logical that the pattern would be followed. Nevertheless, the effort to offer a private sector solution as embodied in the Agreement is commendable as an effort to improve society even if the idea does not branch out.

C. *The Basic Structure and Functions of the Facility*

The Facility's offices will be operated by professionals hired by the subscribing producers and insurers and will be managed by a Board of Directors consisting of an equal number of each.¹⁵⁸ Membership will be open to all producers and insurers who subscribe to the Agreement and carries with it the obligation to cooperate with the Facility.¹⁵⁹ The Facility will have the power to evaluate, settle, pay or defend all asbestos-related bodily injury claims against all members.¹⁶⁰ Moreover, it will act as liaison for all members with non-members and will also arrange ADR for problems which may arise between subscribing members.¹⁶¹

155. Historically, there were some manufacturers that were able to share counsel with other manufacturers. However, the situation was still such that most manufacturers had to have representation in each jurisdiction where there were pending cases. Therefore, a great deal of insurance coverage was expended to pay the resulting legal bills (Private corporate records).

156. 1 MEALEY'S LITIGATION REP.-ASBESTOS, *supra* note 95, at 564.

157. Tarnoff, *supra* note 66, at 56, col. 2.

158. Picone, *supra*, note 47, at 22. At this writing, offices of the Facility will have their headquarters in Princeton, N.J. and there will be a branch office near San Francisco, Cal. Quincy, Massachusetts Standard, Sept. 6, 1985, at 1, col. A.

159. Picone, *supra* note 47, at 22.

160. *Id.*

161. *Id.*

Each asbestos-related bodily injury claim will be handled for all members by the Facility.¹⁶² It will neither settle claims in part nor will it settle claims on behalf of some but not all members.¹⁶³ And, it will neither pay punitive damages in settlement nor will it settle any case in such a fashion as to leave open the issue of punitive damages in a tort case.¹⁶⁴

D. *Claims Handling by the Facility*

Although the exact procedures for claims handling under the agreement are not known at this time, the Facility will provide for this in a broad manner. One very important aspect of claims handling by the Facility is that there will not be a predetermined schedule of benefits for claimants.¹⁶⁵ This is to say that the Facility will evaluate cases on a claim-by-claim basis.¹⁶⁶ Thus, each case will be treated on its own merits and will not simply be placed in an arbitrary classification. This will preserve the individual claimant's rights.

The Facility will provide its own forms for submitting claims.¹⁶⁷ These forms will require that a claimant provide certain standard information such as employment, medical and compensation history.¹⁶⁸ This information will then be used to determine whether or not the claim is eligible for Facility handling.¹⁶⁹ Eligibility will require that the claimant show that he was exposed to the products of at least one Facility member and that he has an asbestos-related condition,¹⁷⁰ defined by radiographic changes or breathing abnormalities.¹⁷¹ If the claim is eligible for Facility handling, settlement will be attempted by evaluating whether there is an asbestos-related physical impairment and dysfunction and whether there is any liability of a Facility member.¹⁷² The evaluation of liability will include any available defenses and setoffs (such as prepaid settlement monies), after which, an appropriate settlement will be of-

162. *Id.*

163. *Id.*

164. *Id.*

165. Tarnoff, *supra* note 125, at 1, 79.

166. Carpenter, *supra* note 57, at 1A, col. 1.

167. Picone, *supra* note 47, at 22, col. 1.

168. *Id.*

169. Background on the Asbestos Claims Facility (1984).

170. *Id.*

171. Picone, *supra* note 47, at 22, col. 1.

172. *Id.*

ferred.¹⁷³ If, however, settlement cannot be reached, the Facility will offer a full range of mediation to promote non-judicial resolution.¹⁷⁴ If a resolution to the claim fails, a joint defense will be provided for all members.¹⁷⁵

The above notions, coupled with the possibilities of resort to the tort system and reapplication to the Facility when and if a claimant's health worsens,¹⁷⁶ should ensure that all individuals who take their claims to the Facility will be treated fairly.

E. *Cost Handling Under the Agreement*

The "coverage block" concept for funding the Facility was mentioned above as a benefit to producers.¹⁷⁷ Basically, the coverage block provided by the subscribing insurers will provide indemnity and defense costs coverage to the subscribing producers.¹⁷⁸ Generally, by the use of predetermined allocation formulas, the Agreement will spread liability for a given claim first among all producers. Then, for each producer, liability will be spread over all of the insurance policies that that producer had from exposure through manifestation of a resulting injury.¹⁷⁹ The coverage block will not be exhausted on a policy-by-policy basis but rather on a total basis for the block, each block representing a particular year of exposure.¹⁸⁰

Specifically, liability and expenses will be allocated to each producer member.¹⁸¹ These allocations will establish the responsibility of each producer for a percentage of the expenses for each claim handled on its behalf by the Facility.¹⁸² According to the proposed formula, those producers that have been sued most frequently and who have paid out the most in indemnity will continue to bear the largest shares of the liability.¹⁸³ The formula takes into account

the number of claims paid or owing [for each producer], the amount of indemnity paid or owing and the number of open claims as of September 30, 1983, plus any new claims reported to the producer or the asbestos facility

173. *Id.*

174. Background on The Asbestos Claims Facility (1984).

175. *Id.*

176. See *supra* notes 135-38 and accompanying text.

177. See *supra* notes 147-55 and accompanying text.

178. 1 ASBESTOS LITIGATION REP., *supra* note 142, at 8356.

179. Lempert, *supra* note 29, at 1, col. 1.

180. Tarnoff, *supra* note 125, at 1.

181. Picone, *supra* note 47, at 22.

182. *Id.*

183. Tarnoff, *supra* note 125, at 79, col. 3.

for the period from October 1, 1983, until one year after the opening of the facility.¹⁸⁴

Moreover, the apportionment takes into account that in some states claims have historically been paid at higher amounts.¹⁸⁵

An example is illustrative of how this will work on a per-claim basis. Assume that Producer A's allocated share is 10% and that a claim is settled for \$200,000. This will mean that Producer A's insurers will have to pay \$20,000. Thus, if Producer A's coverage block covers ten years and includes ten different insurers, each insurer will have to pay one-tenth of the \$20,000 or \$2,000.

Finally, each producer will get credit at the Facility for any settlement or judgment paid prior to the start-up of the Facility.¹⁸⁶ These monies will be reallocated into the sharing formulas to give another measure of equitable treatment to the subscribing producers and insurers.¹⁸⁷

F. Facility Handling of Intraperspective and Extraperspective Problems

One of the key components of the Facility is the means provided by the Agreement to resolve issues that may arise between its members.¹⁸⁸ To resolve these issues, the Agreement allows for a period of negotiation.¹⁸⁹ If this fails, however, a series of steps is provided which will keep certain issues out of the court system.¹⁹⁰ First, there are quasi-judicial proceedings which are to take place under the direction of a presiding trial judge picked from a standing panel. In this process, both parties are to file briefs and engage in a limited five-day discovery period followed by a limited trial. If the trial judge's decision is not acceptable to either party, there will then be steps leading to an appeal before a three-judge appellate panel (also picked from a standing panel). The issues handled by the ADR are designated as either binding, in which case the decision will be final as decided by the appellate panel, or non-

184. *Id.*

185. *Id.* The states treated as "major states" by the Agreement are Pennsylvania, California, Texas, Washington, Virginia, New Jersey, Mississippi and Connecticut. All others are considered to be non-major. See Agreement Concerning Asbestos-Related Claims (June 19, 1985).

186. Picone, *supra* note 125, at 22.

187. *Id.*

188. See Agreement Concerning Asbestos-Related Claims, *supra* note 185, at ¶ VIII. See also *supra* note 144 and accompanying text.

189. See Agreement Concerning Asbestos-Related Claims, *supra* note 185, at ¶ VIII.

190. *Id.*

binding, in which case the parties will have recourse to the judicial system.¹⁹¹

The importance of ADR is that it will give subscribing producers and insurers a means of avoiding protracted litigation among themselves. Moreover, it will promote the policies of the Facility by saving time and money which can be better spent in the resolution of eligible claims. With respect to extraperspective disputes, the Facility will act as liaison for its members with non-members such as other asbestos defendants or the United States Government.¹⁹² In addition, the Facility will have the right to pursue these non-members as third parties in the litigation.¹⁹³ However, the Agreement stresses that there is no obligation on the part of the Facility to pursue such action.¹⁹⁴ Thus, these are left as matters to be handled when necessary in particular circumstances.

G. *New Members*

As a final note to the proposed functioning of the Facility, a few statements about new membership are in order. The opportunity for producers and insurers to become members of the Facility not only exists but, with certain exceptions, is also encouraged.¹⁹⁵ Any company that is in reorganization under Chapter 11 may sign on or before December 31, 1986 without further steps.¹⁹⁶ All others, however, must be approved by the Board of Directors.¹⁹⁷ Further, any late signatory must pay its share of all costs and attorney fees incurred after the June 19, 1985 signing.¹⁹⁸ Finally, the terms of the Agreement may not totally apply to the late signers unless approved specifically by the subscribing members.¹⁹⁹

Since these conditions are not preclusive, it is expected that new members will sign as the Facility progresses. In fact, some have already done so which indicates that the concept is gaining acceptance as it is being implemented.²⁰⁰

191. *Id.*

192. Picone, *supra* note 125, at 22.

193. 1 MEALEY'S LITIGATION REP.-ASBESTOS, *supra* note 95, at 563.

194. *Id.*

195. *Wellington Board Interviews Candidates, Eyes Facility Progress*, 1 MEALEY'S LITIGATION REP.-ASBESTOS 3019 (Oct. 11, 1985).

196. 1 MEALEY'S LITIGATION REP.-INSURANCE, *supra* note 1, at 764.

197. *Id.*

198. *Id.*

199. *Id.*

200. Private corporate records.

IV. REACTIONS TO THE FACILITY

Obviously, the creation of so sweeping and different an alternative as the Facility has elicited a great number of reactions, both positive and negative. The Agreement has been lauded as the "best available solution to the most serious toxic tort litigation, and insurance coverage problems ever to confront our courts and the insurance business."²⁰¹ Generally, those who support the Facility look upon it as a voluntary process that will cut time and costs and which will afford deserving claimants faster relief by circumventing long court battles.²⁰² Some applaud the Facility because it offers a way for producers and insurers to put aside their litigation problems and get on with the business of compensating victims.²⁰³ Even those who are somewhat more guarded in their reactions realize that the Facility is at least available which, in their view, makes it the only viable alternative to litigation.²⁰⁴ These individuals recognize that if the Facility is not "perceived as fair," workers who develop cancer or other asbestos-related illnesses will not use it and will continue the "expensive route through the courtroom."²⁰⁵ This feeling of fairness will ultimately determine the success or failure of the Facility.

There have been various other comments concerning and reactions to the Facility, some negative, some simply questioning. First, there has been some concern over whether there are enough signatories to the Agreement to make it feasible. Those who express this concern have flatly concluded that more signatories are needed to "resolve the asbestos coverage litigation and for the claims-handling facility ultimately to succeed."²⁰⁶ This, however, has not dissuaded the members from going forward and the Facility exists in spite of this observation.²⁰⁷

A second and closely related area centers on the reason why various producers and insurers have chosen not to sign the Agreement. A great deal of concern has been expressed because the Manville Corporation, historically the largest defendant in the asbestos liti-

201. *Opinions-Asbestos Agreement is Best Option*, BUS. INS., Aug. 27, 1984, at 6.

202. Greene, *supra* note 25, at 154.

203. *Opinions-Don't Give Up the Fight*, BUS. INS., Oct. 22, 1984, at 8, col. 1.

204. BUS. INS., Aug. 27, 1984, at 6, col. 1.

205. Young, *Organized Labor Skeptical About Asbestos Facility*, J. COM., March 20, 1985 at 1A, col. 1.

206. *Opinions-Only a Beginning*, BUS. INS., July 1, 1985, at 8, col. 1.

207. See, e.g., *Wellington Settlements Remain Extremely Active*, 1 MEALEY'S LITIGATION REP.-ASBESTOS 2917 (Sept. 27, 1985).

gation, has thus far refused to join the Facility.²⁰⁸ Nevertheless, this problem may be larger in theory than in practice since Manville's Chapter 11 status has caused it to be absent since 1982. Yet, other producers and their insurers have gone forward without that corporation in the litigation and, also, the Facility has been created without its participation.²⁰⁹

Further, Manville has given reasons why it has chosen not to enter into the Agreement. Basically, Manville representatives have taken the position that the federal government should legislate a solution to the asbestos problem, the creation of the Facility notwithstanding.²¹⁰ They feel that the government, as an employer in the U.S. Naval Shipyards, produced the largest number of claimants and, therefore, would escape liability through the Facility's solution.²¹¹ To bolster this argument they condemn the voluntary nature of the Facility because it gives no assurance that it will be used by claimants. Moreover, they believe that the Agreement is flawed because it does not address plaintiff's attorney's contingent fees, does not give a set schedule of benefits and because it allows escape to the court system.²¹² Thus, the Manville representatives feel that all of these factors should be handled by legislative action.²¹³ Nevertheless, their position ignores the simple fact that the government has failed to pass legislation with less stringent requirements than they will accept.²¹⁴ Decades more might pass before this becomes a reality, and such legislation, completely precluding a right to court action, might well be open to constitutional challenges.²¹⁵

Whether or not Manville's major insurer has refused to sign the Agreement because of its connection with the corporation is a matter of supposition. However, Manville's major insurer has indicated that it does not agree with Agreement insurance positions on coverage, etc., because their standard policies are written otherwise.²¹⁶

208. *Costs of Asbestos Litigation*, RAND INSTITUTE FOR CIVIL JUSTICE (July, 1983).

209. *Id.*

210. *Bus. Wk.*, Dec. 8, 1984, at 8, col. 2.

211. *Id.*

212. *Id.*

213. *Id.*

214. Abramowitz, *Manville Chief Claims Bum Rap*, *Washington Post*, Sept. 13, 1985, at 1, col. A.

215. *Id.* Recently there have been indications that Manville might create its own "facility." *Id.*

216. *Bulletin*, MEALEY'S LITIGATION REP.-ASBESTOS, April 4, 1984, at 1 (these statements were made by a Traveler's representative).

Moreover, its representatives have stated that they would not and could not join the group until all of their coverage litigation is completed.²¹⁷ While these are, perhaps, valid short-term positions, they neither handle the asbestos problem nor do they look to more than a future of continued insurance litigation. As shown by the dismal history of asbestos litigation, the better view is concession, not advocacy.²¹⁸

There have been other reasons for not subscribing to the Agreement given by other manufacturers and insurers. First, some producers' reasons were listed in a statement made by a Raymark (formerly Raybestos-Manhattan) official:

Wellington (the agreement) is an untested experiment with many questions remaining unanswered Yet, the price for participation is concession to the Agreement's insurance settlement terms, the complete, irrevocable forfeiture of all rights against the carriers, and the permanent lock-in of the entire inventory of pending cases, all without any assurance of the ultimate success of the facility.²¹⁹

Other companies claim that they have broader coverage than that afforded by the Facility²²⁰ or that they have viable punitive damages claims against their insurers for wrongfully withholding coverage.²²¹ On the insurer's side, some have been hesitant to sign because they have not received assurances that their reinsurers would pay under the new plan.²²² Others have been dissuaded because the asbestos-related property damage issues are not included in the Agreement.²²³ Still others, particularly reinsurers, have been reluctant because they have not been consulted or because they have been concerned about financing a radically new program in the face of other rising responsibilities.²²⁴ Again, these may be valid short-term positions, but severe problems sometimes require drastic change for the long run and, as previously noted, traditional positions have failed to solve the asbestos problem. Moreover, not everyone could be included in the discussions and the Facility is continuing to consider the related issue of property damage.²²⁵

217. *Id.*

218. *See supra* notes 41-50 and accompanying text.

219. Tarnoff, 28 *Tentatively Sign Asbestos Pact*, BUS. INS., July 30, 1984, at 1, col. 1.

220. BUS. INS., *supra* note 204, at 6.

221. *Id.*

222. *Id.*

223. 1 MEALEY'S LITIGATION REP.-ASBESTOS, *supra* note 104, at 1938.

224. Shapiro, *Asbestos Pact Isn't for Reinsurers*, BUS. INS., June 10, 1985, at 24, col. 1.

225. Private corporate records. The property damage issues involve suits filed because

A third type of reaction has come from the insurance coverage litigation. Concern has been expressed that not all of the insurance coverage litigation will be solved because not all parties to it have signed the Agreement²²⁶ or because those producers who have signed will continue to litigate against their insurers who have not signed.²²⁷ Idealistically, all of these suits should be resolved, but this is not immediately possible and a complete condemnation of the Facility for not doing so is not only unfair but ignores the fact that the reduction in the number of defendants and plaintiffs in the cases will reduce costs and allow the insurance cases to be completed sooner.²²⁸ This small measure of relief is better than none given the protracted coverage litigation.

Fourth, claimants have been relatively silent concerning the Facility. However, there have been some statements to the effect that they are suspicious of the Agreement.²²⁹ Given the long-standing adversarial positions of claimants with respect to those who have signed the Agreement, this is not surprising and the suspicion will not be removed until such time as plaintiffs have had a chance to deal with the Facility. However, more significant reactions have come from representatives of claimants—specifically unions and plaintiffs' attorneys.

The comments that have been made by representatives of the AFL-CIO are typical of unions' reactions to the Facility.²³⁰ Chief among their concerns was that the Facility would use its harmony to present a unified front against the victims of asbestos-related disease.²³¹ Moreover, they were skeptical about the criteria for evaluating claims, the nature of awards and whether the monies saved as a result of the Agreement would go to the claimants.²³² They even went so far as to imply that the Facility is a way to wage a war against the plaintiffs.²³³ Other observers, however, were highly critical of these reactions because they felt that union mem-

asbestos products were used in public buildings such as schools.

226. Bus. Ins., *supra* note 206, at 8, col. 1.

227. Tarnoff, *Wellington Settles Few Coverage Suits*, BUS. INS., July 1, 1985, at 1, col. 1, 25, col. 1.

228. *Id.* at 25, col. 1.

229. Pittsburgh Post-Gazette, *supra* note 10, at 1, col. A.

230. See, e.g., Sugawara, *supra* note 11, at 1, col. 1.

231. *Id.*

232. *Id.*

233. Tarnoff, *AFL-CIO Says It's "Uneasy" Over Wellington Agreement*, BUS. INS., March 25, 1985, at 1, col. 1, 8, col. 1.

bers deserved more objective guidance.²³⁴ They categorized the union's positions as inflexible and completely negative toward any proposals made by management and were particularly opposed to the additional union opinion that litigation is the best approach because its high costs force settlements.²³⁵ Thus, the union positions were said to comprise a "knee jerk" reaction, simply designed to be opposed to stated Facility policies without an in-depth analysis of those policies.²³⁶

Of all groups, plaintiffs' attorneys have had the most to say about the Facility. Their reactions have been very frequent and range from very positive to very negative. Their positions can be outlined in five general categories. First, there have been many positive, general comments made by plaintiffs' attorneys concerning the Facility. Some of them have gone so far as to categorize the Agreement as the "single most important thing that's happened in asbestos litigation" ²³⁷ The reasons for such a sweeping statement are several, but basically they stem from the perception by some members of the plaintiffs' bar that the Facility process will be cheaper, faster and fairer than litigation, without precluding litigation if the process does not work.²³⁸ Moreover, they understand that claims can be filed at the Facility without filing lawsuits which will avoid statute of limitations problems for some of their clients.²³⁹ Plaintiffs' attorneys also look to the resolution of insurance litigation as a benefit to their clients in that they feel it will help to free settlement funds.²⁴⁰ Finally, they favor the notion of a "one-stop" location for settlement because it will resolve a major problem that they perceive in the litigation—that of having to deal with a multiplicity of defense attorneys.²⁴¹ They feel that this will ease the difficulty in constructing settlements.²⁴²

Second, some plaintiffs' attorneys have made relatively negative comments about the prospect of the Facility. Frequently, this has been in the expression of a guarded stance toward the Facility.²⁴³

234. *Opinions-Wellington Deserves Better*, BUS. INS., April 1, 1985 at 8, col. 1.

235. *Id.*

236. *Id.*

237. Riley, *supra* note 9, at 25, col. 1.

238. Wall Street Journal, *supra* note 36, at 1, col. 1.

239. Tarnoff, *supra* note 66, at 56, col. 3.

240. *Mixed Sentiments Expressed About Wellington Proposal*, 1 MEALEY'S LITIGATION REP.-ASBESTOS 659, 661 (June 8, 1984).

241. Lempert, *supra* note 29, at 4.

242. Riley, *supra* note 9, at 26, col. 1.

243. 1 MEALEY'S LITIGATION REP.-ASBESTOS, *supra* note 91, at 1943.

In some senses, this reaction is caused by the suspicion that the signatories to the Agreement may use their unity to get leverage in trials or settlement negotiations of asbestos claims.²⁴⁴ This position is compounded by those portions of the Agreement which rule out punitive damages and settlements with individual signatories.²⁴⁵ Even though the former have been included in only fourteen percent of asbestos verdicts and less than one percent of out-of-court settlements,²⁴⁶ their loss is viewed by some of the plaintiffs' bar as a reduction in settlement values.²⁴⁷ The latter causes some members to claim that it limits their cases financially because they will no longer be able to use settlement money from one defendant to pursue another defendant.²⁴⁸ These fears are exacerbated by the notion that the Facility was put together by a common desire not to pay any money on the cases.²⁴⁹ Finally, these plaintiffs' lawyers have a sense that they simply do not know what has been done or what, if anything, will be done to their satisfaction.²⁵⁰ Nevertheless, after assessing the situation, these same lawyers should see that once the Facility's policies are fully implemented, the benefits will outweigh their fears.

Third, there have been some relatively neutral responses by claimants' lawyers about the Facility. Generally those amount to a wait-and-see attitude²⁵¹ and a sense that some of them are willing to listen to what the Facility has to offer.²⁵² Other observers have made similar comments but have cautioned that there is a need to bridge the gap with the plaintiffs' attorneys because their cooperation is necessary to the Facility's success.²⁵³ Steps are being taken to accomplish this and it is hoped that mutual cooperation can be achieved.²⁵⁴

Fourth, one aspect of proposed claims handling by the Facility has caused an ongoing controversy with members of the plaintiffs' bar. The specific aspect is that the Agreement requires physical

244. Riley, *Plaintiffs' Bar Wary of Asbestos Accord*, NAT'L L.J., July 8, 1985, at 3.

245. *Id.* at 60.

246. Kuntz, *supra* note 3, at 83.

247. Riley, *supra* note 244, at 60.

248. *Id.*

249. 1 MEALEY'S LITIGATION REP.-ASBESTOS, *supra* note 240, at 661.

250. Motley, *Commentary-Plaintiff's Attorney Views Wellington*, 1 MEALEY'S LITIGATION REP.-ASBESTOS 2431, 2433 (July 1, 1985).

251. Riley, *supra* note 244, at 60.

252. 1 MEALEY'S LITIGATION REP.-ASBESTOS, *supra* note 91, at 1946.

253. BUS. INS., *supra* note 206, at 8, col. 1.

254. See *infra* note 272 and accompanying text.

impairment *and* dysfunction before a claim will be considered for settlement by the Facility.²⁵⁵ Thus, the issue focuses on whether the Facility will be willing to compensate claimants who show evidence of asbestos exposure, but whose pulmonary functions are normal thereby causing no impairment of their ability to earn a living.²⁵⁶ Historically, some jurisdictions have allowed compensation for those types of injuries and some plaintiffs' lawyers contend that disallowing compensation in these situations is an interference with particular claimants' rights.²⁵⁷ As a result, some of these attorneys have taken a hard line saying that they will refuse to take claims to the Facility absent compensation for these types of injuries.²⁵⁸ There are two reasons, however, why this need not be the case. First, the Facility will allow these types of individuals to return to have their claims reconsidered if their health worsens.²⁵⁹ Second, it is not certain whether these positions will be or even can be divided by bright lines.²⁶⁰ Thus, this is a controversy which should be softened by the passage of time.

The fifth, and perhaps most serious, response by plaintiffs' attorneys involves raising some antitrust issues against the Facility.²⁶¹ At this writing, such a suit has been filed and awaits decision by a Federal District Court in Ohio.²⁶² The suit charges that the Agreement violates federal antitrust and monopoly laws with its central focus directed at the notion that the Facility operates as an exclusive agent for all of the signatories to the Agreement.²⁶³ It is claimed that this violates claimants' rights to settle individually with asbestos producers and that the plan retards the progress of all settlements.²⁶⁴ In addition, the plaintiff has leveled charges that the Wellington plan is simply a product of the signatories' greed for cost reduction without regard to the notion that the Facility

255. Agreement Concerning Asbestos-Related Claims, *supra* note 185, at ¶ VII, cl. 5.

256. Tarnoff, *Plaintiffs' Attorneys Protest Wellington Letter*, BUS. INS., Sept. 23, 1985, at 3, 55. The most common type of condition referred to here is radiographic evidence of pleural plaques. These plaques are scars left on the pleura (linings of the lungs) which alone, do not cause pulmonary dysfunction. R. Fontana, *Lung Cancer and Asbestos Related Pulmonary Disease*, National Cancer Institute (1981).

257. 1 MEALEY'S LITIGATION REP.-ASBESTOS, *supra* note 250, at 2432-33.

258. 1 MEALEY'S LITIGATION REP.-ASBESTOS, *supra* note 91, at 1947.

259. See *supra* note 137 and accompanying text.

260. See *infra* note 273 and accompanying text.

261. Riley, *supra* note 244, at 60.

262. Sweeney v. A C & S, Inc., No. C85-2984 (N.D. Ohio filed Nov. 15, 1985).

263. *Id.*

264. Tarnoff, *Suit Seeks to Stall Asbestos Claims Facility*, BUS. INS., Oct. 28, 1985, at

should resolve claims on a "less contentious" basis.²⁶⁵ Moreover, the suit presupposes that claimants will be treated unfairly even though no claim has yet been handled by the Facility outside of the tort system.²⁶⁶ This is, as are most of the other complaints, premature and unfair because it denies the Facility the opportunity to show exactly how it will function.

V. CONCLUSION

At this writing a physical Facility per se does not exist except in the planning stages. The Board of Directors is hopeful that the actual Facility will be operational by early 1986 and progress continues toward reaching this goal. However, there is a functional Facility in that the signatories have hired attorneys, known as Facility Liaison Counsel, and have created, among others, an Interim Claims Handling Committee.²⁶⁷ This Committee is comprised of nine teams, each of which has an insurer and a producer member, which are handling asbestos-related bodily injury cases as they arise in the tort systems.²⁶⁸ It is thought that this system will continue until the Facility offices are staffed and operational, at which point the permanent Facility staff will begin to handle the claims outside of the courts.²⁶⁹

There have been some encouraging signs that the Facility is gaining acceptance and that it will be allowed to demonstrate that it can handle the asbestos-related bodily injury claims as per its policies and design. First, some cases have been settled and some have been tried successfully by the Facility.²⁷⁰ Generally, these settlements have been perceived as acceptable by the plaintiffs and their attorneys.²⁷¹ Second, there have been several educational meetings held by Facility personnel for plaintiffs' attorneys which in part have addressed the "impairment and dysfunction" issue.²⁷² These meetings have become progressively more amicable and the sense is that most plaintiffs' lawyers will continue to cooperate

265. *Id.*

266. *See infra* notes 267-69 and accompanying text.

267. *See, e.g., Wellington Settlements Remain Extremely Active*, 1 MEALEY'S LITIGATION REP.-ASBESTOS 2917 (Sept. 27, 1985).

268. *Id.*

269. Private corporate records.

270. *Wellington: Settlements, Attorney Briefings Continue*, 1 MEALEY'S LITIGATION REP.-ASBESTOS 3014 (Oct. 11, 1985).

271. *Id.*

272. *Settlements: Baron Rips Wellington for Settlement Posture*, 1 MEALEY'S LITIGATION REP.-ASBESTOS 3165 (Nov. 8, 1985).

with the Facility while policy issues are resolved.²⁷³ Third, and perhaps most encouraging, some plaintiffs' attorneys have recommended that their clients accept the so-called "green cards" which will allow the claimant to return to the Facility if and when his disease progresses.²⁷⁴

In conclusion, it appears hopeful that the above pattern of progressive acceptance of the Facility will continue and that the more serious questions about the Facility will be allowed to be resolved as time passes. Moreover, it appears that the awkwardness and mistrust, which are understandably connected to dealing with a group of long-standing adversaries in a new entity, are lessening. However, more work needs to be done and, notwithstanding the adversarial nature of our society or the special interests of the groups involved in asbestos-related litigation, the Facility, as the only viable alternative to the court system, needs to be given every chance to function and handle the problem for which it was designed. As always, solutions require concessions and time must be given to allow them to work. Therefore, the Asbestos Claims Facility should be given the opportunity and cooperation to stand or fall on its own merits. It should not be judged emotionally at a point in time not long removed from its inception, but from the perspective of a performance record which will show whether or not it effectively handles the asbestos crises. It appears to be a sound alternative to litigation and those who negotiated it, those who designed it, and those who have thus far cooperated with it are to be commended.

Leland G. Smith

273. 1 MEALEY'S LITIGATION REP.-ASBESTOS, *supra* note 270, at 3014.

274. 1 MEALEY'S LITIGATION REP.-ASBESTOS, *supra* note 272, at 3166.